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THE UNITED STATES SUPREME COURT: THE 1986-1987 TERM (PART II)

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This is the second of a two-part article on the Supreme Court's criminal procedure cases decided this Term.

PREVENTIVE DETENTION

For the first time, the Supreme Court addressed the constitutionality of preventive detention in a criminal trial. *United States v. Salerno*, 107 S.Ct. 2095 (1987). The Bail Reform Act of 1984 permits a federal court to detain an arrestee pending trial if the prosecution demonstrates by clear and convincing evidence, after an adversary hearing, that no release conditions "will reasonably assure . . . the safety of any other person and the community." The Second Circuit had found this provision facially unconstitutional as violative of "substantive due process." *United States v. Salerno*, 794 F.2d 64 (2d Cir. 1986).

The Supreme Court reversed. The Court first addressed the substantive due process issue, i.e., whether preventive detention authorizes impermissible punishment before trial. This argument depends on whether preventive detention is punitive or regulatory. The Court ruled that Congress intended preventive detention to be regulatory, a purpose it found to be legitimate: "There is no doubt that preventing danger to the community is a legitimate regulatory goal." *Id.* at 2101. In addition, preventive detention was not excessive in relation to this regulatory goal because the Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious crimes — crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders. Moreover, the arrestee is entitled to a prompt detention hearing, and the maximum length of detention is limited.

The Court also believed that the procedural safeguards required by the Bail Reform Act supported its holding:

Detainees have the right to counsel at the detention hearing. . . They may testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing. . . The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include the

nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community. . . The government must prove its case by clear and convincing evidence. . . Finally, the judicial officer must include written findings of fact and a written statement of reasons for a decision to detain. . . The Act's review provisions . . . provide for immediate appellate review of the detention decision. *Id.* at 2104.

The Court next considered an Eighth Amendment argument, i.e., whether the Act violated the Excessive Bail Clause. According to the Court, the Clause says nothing about whether bail must be available; it only proscribes excessive bail. The right to bail is not absolute. For example, a court may refuse bail in capital cases or when the defendant presents a threat to the judicial process by intimidating witnesses. While the Court acknowledged that the primary function of bail is to safeguard the court's role in adjudicating guilt or innocence, it rejected "the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through the regulation of pretrial release." *Id.* at 2104.

RIGHT TO COUNSEL

Pennsylvania v. Finley, 107 S.Ct. 1990 (1987), involved the right to counsel when a conviction is challenged in a collateral proceeding. In particular, *Finley* concerned the application of *Anders v. California*, 386 U.S. 738 (1967). *Anders* held that when an attorney appointed to represent an indigent defendant on *direct appeal* finds a case wholly frivolous:

[H]e should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. *Id.* at 744.

The Supreme Court, however, has never held that prisoners have a constitutional right to counsel when mounting a collateral attack. *Johnson v. Avery*, 393 U.S. 483, 488 (1969). The Court's cases establish that the right to appointed counsel extends only to the first appeal of right. For example, it does not extend to discretionary appeals. *Ross v. Moffit*, 417 U.S. 600 (1974). Thus, even though the State had provided a right to counsel in collateral proceedings as a matter of state law, the federal Constitution, according to the Court in *Finley*, does not "dictate the exact form such assistance must assume." 107 S.Ct. at 1995. Accordingly, the strict procedural guidelines of *Anders* were not applicable.

BURDEN OF PROOF

Martin v. Ohio, 107 S.Ct. 1098 (1987), involved the constitutionality of allocating the burden of persuasion on self-defense to the defendant. Martin was charged with aggravated murder and pleaded self-defense. An Ohio statute provided: "The burden of going forward with the evidence of an affirmative defense, and the burden of proof by a preponderance of the evidence, for an affirmative defense, is upon the accused." R.C. § 2901.05(A). Under Ohio law, self-defense is an affirmative defense, and the trial court instructed the jury accordingly. Martin argued that placing on her the burden of proving self-defense violated the Due Process Clause.

On review, the Supreme Court rejected this argument. In *In re Winship*, 397 U.S. 358 (1970), the Court had declared that the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364. In *Patterson v. New York*, 432 U.S. 197 (1977), the Court ruled that *Winship* was not violated where the state was required to prove beyond a reasonable doubt each of the elements of murder, but placed on the defendant the burden of proving the affirmative defense of extreme emotional disturbance, which reduced murder to manslaughter. According to the Court, *Patterson* controlled. The jury had been instructed that the prosecution had to establish the essential elements of aggravated murder beyond a reasonable doubt. An affirmative defense, whether self-defense or insanity, is not an essential element of the charged crime and, thus, the burden of persuasion could be allocated to the defendant. It did not matter that only Ohio and South Carolina had chosen to allocate this burden to the defendant.

HYPNOTICALLY-REFRESHED TESTIMONY

Rock v. Arkansas, 107 S.Ct. 2704 (1987), involved the admissibility of testimony of a defendant whose memory had been refreshed through hypnosis. Rock was charged with the death of her husband. She told the police that her husband had attacked her, at which time she had picked up a gun. When he hit her again, she shot him. Because she could not remember the precise details of the incident, her attorney suggested that she submit to hypnosis. After hypnosis, she recalled that she did not have her finger on the trigger at the time the weapon discharged. She also recalled that the weapon fired when her husband grabbed her. Based on this information, her attorney had the gun examined by a firearms

expert, who concluded that the gun was defective and prone to fire, when hit or dropped, without the trigger being pulled. The trial court excluded her testimony because she had been hypnotized, a ruling that was upheld by the Arkansas Supreme Court. Rock's appeal focused on her right to testify in her own behalf.

On review, the Supreme Court agreed with Rock's contention and reversed. The Court began its analysis by recognizing a right to testify. "At this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." *Id.* at 2708. This right is based on due process, the right of compulsory process, the right to counsel, and the privilege against self-incrimination. Although the Court recognized the problems associated with hypnotically-refreshed testimony, it found the Arkansas per se rule of inadmissibility to be an arbitrary restriction on the defendant's right to testify. A less restrictive approach, however, might have satisfied constitutional guarantees: "The State would be well within its powers if it established guidelines to aid trial courts in the evaluation of posthypnosis testimony and it may be able to show that testimony in a particular case is so unreliable that exclusion is justified." *Id.* at 2714.

IMPEACHMENT OF VERDICTS

The defendants in *Tanner v. United States*, 107 S.Ct. 2739 (1987), were convicted of mail fraud and conspiracy to defraud the United States. After the verdict, the defense counsel received an unsolicited telephone call from a juror, who stated that several of the jurors consumed alcohol during the lunch breaks, which caused them to sleep through the afternoons. In a post-verdict hearing, the trial court refused to admit the testimony concerning juror intoxication. A later affidavit by a second juror described further episodes of intoxication as well as marijuana and cocaine use. The defendants argued that the trial court's action violated Federal Evidence Rule 606(b) and the right to trial by jury.

The Supreme Court disagreed. By the turn of the century, the firmly established common law rule flatly prohibited the admission of juror testimony to impeach a verdict. The rule was intended to encourage freedom of deliberation, finality of verdicts, and protection of jurors against harassment. An exception for situations of "extraneous influence," however, was eventually recognized. Thus, a juror could testify about the reading of prejudicial newspaper accounts in the juryroom. In contrast, misunderstandings about jury instructions were considered "internal" to the jury deliberation process and thus not subject to juror testimony. The external-internal distinction is codified in Federal Rule 606(b). According to the Court, the legislative history of this rule clearly established that juror drunkenness was not considered an external influence. In addition, the Court found that the allegations about juror intoxication did not violate the defendants' right to trial by an impartial and competent jury.

RELEASE-DISMISSAL AGREEMENTS

Bernard Rumery was charged with tampering with a witness. The charges arose from Rumery's conversa-

tions with a woman who had allegedly been sexually assaulted by a friend of Rumery. The substance of the conversations was disputed, and Rumery's attorney told the prosecutor that if the charges were not dismissed, Rumery would win the case and then sue. The prosecutor and Rumery subsequently entered into an agreement under which the charges would be dropped and Rumery would release any claims he had against the town, its officials, or the victim. Although the charges were dropped pursuant to this agreement, Rumery brought a § 1983 action against the town and its officials, alleging a violation of his constitutional rights. Relying on the release-dismissal agreement, the defendants moved to dismiss the suit. Rumery argued that the agreement was against public policy. The First Circuit accepted this argument and adopted a *per se* rule invalidating release-dismissal agreements.

On review, the Supreme Court reversed: "[A]lthough we agree that in some cases these agreements may infringe important interests of the criminal defendant and of society as a whole, we do not believe that the mere possibility of harm to these interests calls for a *per se* rule." *Town of Newton v. Rumery*, 107 S.Ct. 1187, 1192 (1987). First, such agreements are not inherently coercive. Criminal defendants are often required to make difficult choices that effectively waive constitutional rights. Plea bargaining is an example. At the time he signed the agreement, Rumery was not in jail and was represented by counsel. He waited three days to make a decision. Second, while such agreements may tempt prosecutors to bring frivolous charges in reaction to a civil rights claim, this possibility should not lead to the prohibition of all release-dismissal agreements. Finally, the prosecutor offered a valid reason for entering into the agreement — to protect the alleged victim from the public scrutiny and embarrassment she would have endured if she had had to testify in the criminal and civil cases. The Court wrote:

In sum, we conclude that this agreement was voluntary, that there is no evidence of prosecutorial misconduct, and that enforcement of this agreement would not adversely affect the relevant public interests. *Id.* at 1195.

Justice O'Connor, who cast the decisive vote, wrote a concurring opinion. She agreed that a case-by-case approach, rather than a *per se* rule, was appropriate in this context. Her disagreement with the Court is summarized in the following passage:

The defendants in a § 1983 suit may establish that a particular release executed in exchange for the dismissal of criminal charges was voluntarily made, not the product of prosecutorial overreaching, and in the public interest. But they must *prove* that this is so; the courts should not presume it as I fear portions of . . . the Court's opinion may imply. *Id.* at 1197.

DISCOVERY

Pennsylvania v. Ritchie, 107 S.Ct. 989 (1987), involved a criminal defendant's right of access to confidential files. Ritchie was charged with the sexual assault of his 13-year-old daughter. The Children and Youth Services (CYS), a protective service agency, investigated the incident. During pretrial discovery, Ritchie served CYS with a subpoena seeking access to the records concerning his

daughter. CYS claimed the records were privileged under state law, and the trial court refused to order disclosure. Ritchie was convicted and appealed. The Pennsylvania Supreme Court ruled that the Confrontation and Compulsory Process Clauses required full access to the records.

On review, the Supreme Court affirmed in part, reversed in part, and remanded the case for further proceedings. Ritchie claimed that denying him access to the records interfered with his right to cross-examine his daughter at trial. A plurality of the Court rejected this argument:

The opinions of this Court show that the right of confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination . . . The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. Normally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses. *Id.* at 999.

In addition, the Court preferred to evaluate Ritchie's claim under a due process, rather than a compulsory process, analysis. Due process requires the prosecution to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Although the state's interest in confidentiality is strong, this interest does not necessarily mean that disclosure should be precluded in all circumstances. If material to a criminal defendant's defense, the records should be disclosed. Consequently, the case was remanded: "Ritchie is entitled to have the CYS file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial." 107 S.Ct. at 1002.

The Court, however, did not believe that the defense attorney had a right to examine the records. The defendant's interest in a fair trial can be protected by an *in camera* review by the trial court. Full disclosure to the defense would "sacrifice unnecessarily the Commonwealth's compelling interest in protecting its child abuse information." *Id.* at 1003.

Justice Blackmun, who cast the decisive vote, wrote a concurring opinion. He disagreed that the Confrontation Clause protects only trial rights and has no relevance to pretrial discovery: "In my view, there might well be a confrontation violation if, as here, a defendant is denied pretrial access to information that would make possible effective cross-examination of a crucial prosecution witness." *Id.* at 1004.

DEATH PENALTY

Mandatory Capital Punishment

The Court examined the constitutionality of mandatory capital punishment in *Sumner v. Shuman*, 107 S.Ct. 2716 (1987). Shuman was sentenced under a statute that mandated the death penalty for a prison inmate who is

convicted of murder while serving a life sentence without the possibility of parole. In prior cases the Court had reserved judgment on this issue.

In *Shuman* the Court gave its answer. Mandatory death sentences violate the Eighth Amendment proscription against cruel and unusual punishment. The statute was deficient for two reasons. First, it precluded the consideration of any mitigating circumstances, about either the prison murder or the predicate offense which resulted in the life-term. "Without consideration of the nature of the predicate life-term offense and the circumstances surrounding the commission of that offense, the label 'life-term inmate' reveals little about the inmate's record or character." *Id.* at 2725.

Second, a mandatory capital-sentencing procedure does not necessarily increase deterrence. Even without a mandatory penalty, an inmate convicted of a prison murder runs the risk that the death penalty will be imposed under the State's guided-discretion capital statute.

Accomplice Liability

Tison v. Arizona, 107 S.Ct. 1676 (1987), involved the constitutionality of imposing the death penalty on defendants who neither intended to kill the victims nor inflicted the fatal wounds. Gary Tison was serving a life sentence for murder when his three sons helped him and a cellmate, another convicted murderer, escape. Later, they flagged down a passing car. The occupants included a father, mother, two-year old son, and a niece. Tison and the cellmate killed all four. His sons were apparently surprised by the shootings. One son died in a roadblock shootout, and Gary Tison escaped into the desert where he subsequently died of exposure. The cellmate and two remaining sons were tried on capital charges. Convicted under accomplice liability and felony-murder statutes, each defendant was subsequently sentenced to death and appealed.

The focus of the appeal was the Supreme Court's decision in *Enmund v. Florida*, 458 U.S. 782 (1982). In that case the Court had reversed a death sentence imposed under Florida's felony-murder rule. *Enmund* had been the getaway driver in an armed robbery of a dwelling. His accomplice had killed an elderly couple when they resisted the robbery. The Court found the death penalty disproportionate to the crime of robbery-felony murder in these circumstances, because *Enmund*'s participation in the murders was too tangential. The Court did not believe that "the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken." *Id.* at 798-99.

The Tison brothers argued that *Enmund* controlled. The Supreme Court disagreed. According to the Court, that case concerned only the two extremes. At one pole was someone like *Enmund* who was a minor actor, not at the scene, and who neither intended to kill nor was found to have had any culpable mental state. At the other pole was the felony-murderer who actually killed or intended to kill. The Tison brothers' cases fell somewhere between these two poles. In determining whether the death penalty was proportional for killings that fell between these extremes, the Court focused on two factors: first, the degree of participation in the felony, and

second, the culpable mental state. As for the requisite mental state, the Court found "intent to kill" a too restrictive criterion. "[R]eckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.'" 107 S.Ct. at 1688. Accordingly, "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." *Id.*

Racial Discrimination

The defendant in *McCleskey v. Kemp*, 107 S.Ct. 1756 (1987), challenged the imposition of his death sentence based on a statistical study that showed that the death penalty was imposed in Georgia more often on black defendants and killers of white victims than on white defendants and killers of black victims. The study examined over 2,000 murder cases that occurred during the 1970s. "The raw numbers . . . indicate that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases." *Id.* at 1763. When the race of the victim and the race of the defendant were considered together, the study showed the following:

[T]he death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims. *Id.*

Based on this study, *McCleskey* challenged his sentence on equal protection, as well as cruel and unusual punishment, grounds. The Supreme Court rejected both. The Court began its equal protection analysis by noting that the defendant had to prove a discriminatory purpose in his case. He offered no specific evidence of such. Instead, he relied solely on the statistical study. Although the Court had relied on statistical evidence in other areas, such as jury selection, it believed that the nature of the capital sentencing decision was different: "Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense." *Id.* at 1767. Moreover, the Court viewed discretion as an integral part of the sentencing system and thus demanded stronger evidence than that provided by the statistical study:

Implementation of these [murder] laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused. The unique nature of the decisions at issue in this case also counsel against adopting such an inference from the disparities indicated by the [statistical] study. Accordingly, we hold that the . . . study is clearly insufficient to support an inference that any of the decisionmakers in *McCleskey*'s case acted with discriminatory purpose. *Id.* at 1769.

Next, the Court considered *McCleskey*'s Eighth Amendment argument — that the Georgia system was arbitrary and capricious in its application due to the

influence of racial considerations. Again, the Court rejected his argument. The Court first noted the safeguards against racial prejudice that it had required in the jury selection process. It also emphasized once more the role of discretion and its value to defendants in the criminal justice system. Measured against these protections and values, the statistical study prove insufficient:

In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the . . . study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process. *Id.* at 1778.

Mitigating Circumstances

In a number of cases, the Supreme Court has held that the sentencer in a capital case “may not refuse to consider or be precluded from considering ‘any relevant mitigating evidence.’” *Skipper v. South Carolina*, 106 S.Ct. 1669, 1671 (1986) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982) (plurality opinion)). The issue again came before the Court in *Hitchcock v. Dugger*, 107 S.Ct. 1821 (1987). At the sentencing phase of trial, the defendant introduced evidence of his family background and capacity for rehabilitation. The Florida statute in effect at the time, however, listed specific mitigating factors. The judge’s instruction to an advisory jury indicated that only those factors were relevant. Since the judge refused to consider the evidence of nonstatutory mitigating circumstances, the Court reversed the death sentence.

Victim Impact Statements

Booth v. Maryland, 107 S.Ct. 2529 (1987), presented the question whether the Constitution prohibits a jury from considering a “victim impact statement” (VIS) during capital sentencing proceedings. The Court held that it did.

Booth was convicted of first-degree murder in the deaths of an elderly couple. Under Maryland statutory law, the VIS is part of the presentence report and may be read to the jury during the sentencing phase of a trial. The VIS in Booth’s case was based on interviews with the victims’ son, daughter, son-in-law, and granddaughter. Parts of the VIS emphasized the victims’ outstanding personal qualities. Other parts disclosed the severe emotional and personal problems the family members had faced as a result of the crime. The VIS was read to the jury, and they sentenced Booth to death.

The Court ruled that the information in the VIS was irrelevant to a capital sentencing decision, and that its admissibility created the risk that the death penalty would be imposed arbitrarily and capriciously. In carrying out its task, “the jury is required to focus on the defendant as a uniquely individual human being.” *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The VIS, however, focuses on the victim and the effect of the crime on his family, factors that may be wholly unrelated to the blameworthiness of the particular defendant.

Allowing the jury to rely on a VIS therefore could result in imposing the death sentence because of factors about which the defendant was unaware, and that

were irrelevant to the decision to kill. This evidence thus could divert the jury’s attention away from the defendant’s background and record, and the circumstances of the crime. 107 S.Ct. at 2534.

In addition, the VIS introduces an arbitrary element into the decision-making process. The relatives in *Booth* were articulate in expressing their grief. Other victims, however, may not leave behind any relatives, or the family members may be inarticulate. “The fact that the imposition of the death sentence may turn on such distinctions illustrates the danger of allowing juries to consider this information.” *Id.* Finally, the Court was concerned how the defendant might rebut such evidence; the Court feared a mini-trial on the victim’s character, which would distract the jury from its central task.

Sympathy Instruction

The defendant in *California v. Brown*, 107 S.Ct. 837 (1987), challenged a jury instruction on sympathy, which was given during the penalty phase of his capital case. Brown was found guilty of rape and first degree murder. In the penalty phase, the prosecution presented evidence that the defendant had raped another girl on a prior occasion. The defense presented family members and a psychiatrist. The trial court instructed the jury to consider the aggravating and mitigating circumstances and to weigh them in determining the appropriate penalty. The court also cautioned the jury that it “must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.” Brown was sentenced to death. The California Supreme Court reversed on constitutional grounds.

On review, the U.S. Supreme Court disagreed. According to the Court, its Eighth Amendment jurisprudence established two prerequisites to the imposition of the death penalty. First, sentencers may not be given unbridled discretion in imposing capital punishment. See *Gregg v. Georgia*, 428 U.S. 153 (1976). Second, a capital defendant generally must be allowed to introduce any relevant mitigating evidence regarding his character, record, or the circumstances of the offense. See *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The Court held that the “instruction given by the trial court in this case violates neither of these constitutional principles.” 107 S.Ct. at 839.

The Court believed that the California Supreme Court had improperly focused solely on the word “sympathy.” The instruction cautioned against being swayed by “mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.” The Court believed that reasonable jurors would not focus only on the phrase “mere sympathy,” and if they did, they “would likely interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase.” *Id.* at 840. The Court added:

An instruction prohibiting juries from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issues at the trial, does not violate the United States Constitution. It serves the useful purpose of confining the jury’s imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think, would

be far more likely to turn the jury against a capital defendant than for him. *Id.*

ular case." *Id.* at 1770.

DOUBLE JEOPARDY

Death-Qualified Juries

In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Court held that a capital defendant's right to an impartial jury under the Sixth Amendment prohibited the exclusion of venire members "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 522. Exclusion should be limited only to those who were "irrevocably committed . . . to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings," and to those whose views would prevent them from making an impartial decision on the question of guilt. *Id.* at 522 n.21. See also *Wainwright v. Witt*, 469 U.S. 412 (1985). In *Davis v. Georgia*, 429 U.S. 122 (1976), the Court held that when a trial court misapplies *Witherspoon* and excludes from a capital jury a prospective juror who in fact is qualified to serve, a death sentence imposed by that jury cannot stand. *Gray v. Mississippi*, 107 S.Ct. 2045 (1987), presented the question whether *Davis* should be abandoned in favor of a harmless-error analysis. The Court reaffirmed *Davis*, again rejecting a harmless-error analysis in this context:

Because the *Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury, . . . and because the impartiality of the adjudicator goes to the very integrity of the legal system, the . . . harmless-error analysis cannot apply. We have recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." . . . The right to an impartial adjudicator, be it judge or jury, is such a right. *Id.* at 2056-57.

Buchanan v. Kentucky, 107 S.Ct. 2906 (1987), also focused on death-qualified juries. *Buchanan*, along with an accomplice, was charged with capital murder. They were tried together. The trial court granted a defense motion to dismiss the capital portion of the indictment because *Buchanan* was not the triggerman and had not intended to kill. Both defendants were convicted; the codefendant received the death penalty. *Buchanan* claimed that trial by a death-qualified jury deprived him of his Sixth Amendment right to an impartial jury selected from a fair cross-section of the community.

The Supreme Court disagreed. According to the Court, *Buchanan's* claim was foreclosed by *Lockhart v. McCree*, 106 S.Ct. 1758 (1986), in which the Court had held that "death qualification" prior to the guilt phase of the trial did not violate the fair cross-section requirement. That requirement applied only to venires, not to petit juries. Moreover, "*Witherspoon-excludables*" did not constitute a distinctive group for fair cross-section purposes. In sum, *McCree* concluded that "the Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the partic-

Broken Plea Agreement

The defendant in *Ricketts v. Adamson*, 107 S.Ct. 2680 (1987), was charged with first degree murder in the death of Donald Bolles, a reporter for the Arizona Republican. He pleaded guilty to second degree murder pursuant to a plea bargain, in which he agreed to testify against two other defendants. The agreement provided that "[s]hould the defendant refuse to testify or should he at any time testify untruthfully . . . then this entire agreement is null and void and the original charge will be automatically reinstated." The trial court accepted the plea but withheld sentencing. *Adamson* testified against the other defendants, who were convicted of first degree murder. He was then sentenced. The convictions of the other defendants, however, were reversed on appeal, and *Adamson* refused to testify at the retrial. He claimed that his obligation to testify under the agreement ended when he was sentenced. The prosecution considered his refusal to testify as a breach of the agreement, and *Adamson* was subsequently tried, convicted of first degree murder, and sentenced to death. In a federal habeas proceeding, the federal appellate court ruled that his double jeopardy rights had been violated.

The Supreme Court reversed. The Court acknowledged that absent special circumstances, the Double Jeopardy Clause would bar prosecution for first degree murder because second degree murder was a lesser included offense. According to the Court, the special circumstances were *Adamson's* waiver of his double jeopardy claim. The Court believed the agreement was clear; should *Adamson* not testify after pleading guilty to second degree murder, the agreement was void, and he could be tried for first degree murder. This agreement necessarily involves a waiver of double jeopardy rights.

Reversal After Appeal

Montana v. Hall, 107 S.Ct. 1825 (1987), involved a retrial after a successful appeal. *Hall* was convicted of incest of his stepdaughter and appealed. During the appellate process, the State discovered that the incest statute had not applied to stepchildren at the time of the crime. An amendment, which included stepchildren, became effective three months after the incident in question. The State brought the issue to the attention of the Montana Supreme Court, which reversed *Hall's* conviction on ex post facto grounds. The court also concluded that a retrial for sexual assault was precluded because incest and sexual assault were the "same offense" for double jeopardy purposes.

On review the Supreme Court reversed per curiam. Under the Court's double jeopardy jurisprudence, the successful appeal of a judgment of conviction, on any ground other than the sufficiency of the evidence, does not bar further proceedings for the same offense. Since *Hall's* conviction was reversed on ex post facto grounds, rather than for insufficient evidence, a retrial on the sexual assault charge was permissible.